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Comments on Executive Rulemaking and Democratic Legitimacy: "Reform" in the United States and the United Kingdom's Brexit by Susan Rose-Ackerman

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COMMENTS ON *EXECUTIVE RULEMAKING AND DEMOCRATIC LEGITIMACY: "REFORM" IN THE UNITED STATES AND THE UNITED KINGDOM'S ROUTE TO BREXIT* BY SUSAN ROSE-ACKERMAN

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INTRODUCTION

Professor Rose-Ackerman's contribution to this Symposium,[1] *Executive Rulemaking and Democratic Legitimacy: "Reform" in the United States and the United Kingdom's Route to Brexit*, was enlightening to a reader like myself who knows little about the nuances of the British administrative state. The comparative approach provides a useful perspective as we witness potentially major changes in domestic (that is, in the United States) administrative law and the relationships between agencies and other political actors. Rose-Ackerman's paper strikes me as primarily descriptive with a strong, if somewhat implicit, normative punch. She describes two countries—the United States and the United Kingdom—that are heading in opposite directions with respect to the kinds of procedures utilized in executive-branch policymaking or, perhaps more precisely for my purposes, policymaking by administrative agencies. Specifically, Rose-Ackerman describes recent developments in each country regarding what I will, for ease of reference, term *participatory procedures*—procedures that allow the public to weigh in on or otherwise affect what the agency does. The archetypal example of a participatory procedure seems to be the notice and comment process. The normative implications of Rose-Ackerman's paper, as I read it, come from connecting these participatory procedures to democratic legitimacy.[2] All else being equal more participatory procedures is a good because democratic participation and presumably democratic accountability along with it, is a good. The qualification is important, though,

1. I would like to take the opportunity to thank both Peter Strauss and the Chicago-Kent College of Law for organizing this Symposium.

2. *E.g.*, Susan Rose-Ackerman, *Executive Rulemaking and Democratic Legitimacy: "Reform" in the United States and the United Kingdom's Rout to Brexit*, 94 CHI.-KENT L. REV. 267, 270–73 (2019).

since sometimes the need for expert assessment or decision making makes public participation infeasible or undesirable.[3]

The baseline in the US is marked by extensive participatory procedures, primarily in the form of notice and comment mandated by the Administrative Procedure Act.[4] The public, or more commonly interest groups, have the opportunity to express their views on the proposed agency action and the agency must meaningfully respond to many of their comments.[5] The UK administrative state, on the other hand, does not have a tradition of thick participatory procedures—there is nothing like the general APA requirement that applies to run of the mill agency policymaking. However, Rose-Ackerman describes substantial changes on both sides of the Atlantic, amounting to something of a reversing course, or at least the potential beginnings of one, in both countries. For example, as Rose-Ackerman explains, the Trump Administration has resisted using participatory procedures in implementing its deregulatory agenda,[6] and judicial enforcement of those procedures has stymied the administration's policy goals.[7] Along similar lines, the previous House of Representatives had passed the Regulations from the Executive in Need of Scrutiny (REINS) Act, which would require major agency-crafted rules to be approved by both houses of Congress. While this would appear to enhance democratic legitimacy of agency policymaking by further involving elected branches of government (Congress and the President are, of course, already involved in enacting the legislation that empowers the agency to act in the first place)—thus serving the same ends as participatory procedures—Rose-Ackerman points out that the practical impact of the law would be to bring rulemaking to a virtual standstill.

The trajectory for recent developments in the UK is the opposite. Rose-Ackerman identifies a trend towards increased respect for participatory procedures and some tentative steps towards requiring them in a greater number of cases. As noted above, there exists no general default rule for extensive participatory procedures analogous to the APA's notice and comment process. Isolated laws call for "consultation," the British equivalent, but these are the exception rather than the rule. All democratic legiti-

3. *See, e.g.*, Nicholas Almendares, *Blame-Shifting, Judicial Review, and Public Welfare*, 27 J.L. & POL. 239 (2012).

4. 5 U.S.C. §§ 701–706 (2012).

5. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); *see also* Kimberly D. Krawiec, *Don't Screw Joe the Plummer: The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 56–57 (2013).

6. Rose-Ackerman, *supra* note 2, at 298–300.

7. *See, e.g.*, William Buzbee, *Deregulatory Splintering*, 94 CHI.-KENT L. REV. 439 (2019).

macy for British agency action, in the main, runs through Parliament. In a method strikingly similar to that contemplated by the REINS Act, most UK bureaucratic rulemaking must be ratified by the legislature.[8] The difference in the practical impacts of what is, in essence, the same procedure owing to differences in the political systems in the respective countries. Moreover, the REINS Act and Parliamentary ratification have different normative implications due to their different effects and because they each operate with different participatory procedures in the background. Courts in the UK have made tentative steps towards expanding the scope of consultation with recent opinions suggesting that courts might find a universal requirement for a participatory procedure like it.[9] The House of Lords has also occasionally acted, using its legislative authority to, at least in limited ways, force more transparency in UK policymaking.[10] While not a participatory procedure per se, at least not the way I mean the term, this action by the House of Lords has the same function of increasing public involvement in policymaking, even policymaking that is quite technical, like that entailed in Brexit. And such technical matters are the typical grist for agency action.

In both the British and American cases these are only initial steps, if even that. The REINS Act has not been enacted into law and is unlikely to go much further in the current political climate; courts in the UK have not endorsed a wide-ranging consultation right that would be tantamount to a judicially-created version of notice and comment. Yet, these are evocative trends in participatory procedures. Below I describe some of the structural characteristics that have led the US and the UK to take such different paths with respect to participatory procedures used by administrative agencies. This paper is therefore intended as something of a companion piece to Rose-Ackerman's contribution, supplying some theoretical observations that support it.[11] Looking at these structural features also helps explain one of the most striking features of the trends Rose-Ackerman describes: the push for more participatory procedures, and through them greater democratic legitimacy in agency policymaking, is coming uniformly from *undemocratic* actors within the UK political system. It is one thing for an institution that is itself democratically-accountable to demand greater public participation: in a way doing so can be self-serving because the same constituency that controls this institution will be the one to benefit from

8. Rose-Ackerman, *supra* note 2, at 274–75.

9. *Id.* at 286–87.

10. *Id.* at 275, 295.

11. Rose-Ackerman's work draws on the same traditions and literatures I reference here. *See, e.g.*, Susan Rose-Ackerman & Peter L. Lindseth, *Comparative Administrative Law: Outlining a Field of Study*, 28 WINDSOR Y.B. ACCESS JUST. 435 (2010).

this participation. The democratically-accountable institution is in this way simply serving its constituency's interests, increasing their power over policymaking. The motivations for the courts, on the other hand, are less straightforward.[12] One thing my theoretical and structural remarks reveal is that if there is going to be a push for increased participatory procedures in the UK, then it would almost assuredly have to come from undemocratic actors like the courts or House of Lords.[13] In other words, conditional on there being increased opportunities for public participation in policymaking, there is every reason to expect that not to be caused by ordinary Parliamentary lawmaking because the House of Commons has little incentive to do so. This is in stark contrast to the US experience, where the backbone of participatory procedures comes from a statute, albeit one much elaborated on by the courts. I then conclude with some questions raised by the piece that could help guide future research into the connection between agency procedures and democratic legitimacy.

I. THE POLITICS OF PARTICIPATION

One longstanding argument in favor of participatory procedures is essentially technocratic: participation by interested parties gives the agency the information it needs to do its job and do it well. This makes the most sense when agency policymaking affects a specialized industry; the industry often will have private information relevant to the agency's rules, information that may be costly, difficult, or impossible to acquire elsewhere. Information about the technology used by the regulated industry is a common example. Another example would be the ways that Dodd-Frank and the Volcker Rule were likely to impact the finance industry.[14] This sort of participation, while sometimes valuable, does not have a clear connection to democratic legitimacy. On occasion, a more democratic version of it will emerge, such as when a community has analogous specialized information about how a proposed agency rule will affect them. And, there are other cases where public sentiment is itself a valuable piece of information for the agency to learn (net neutrality seems to be the most high-profile exam-

12. One possibility is that greater participatory procedures increase judicial control over policymaking, turning them into gatekeepers.

13. Here I am dividing the world into democratic and undemocratic actors. This is quite a coarse, and sometimes problematic way to label things. Sometimes institutions that are not themselves democratic can enhance democracy in various ways, as is the case, I think, of the potential increase in participatory procedures in the UK. For another example, see Nicholas Almendares & Patrick Le Bihan, *Increasing Leverage: Judicial Review as a Democracy-Enhancing Institution*, 10 Q.J. POL. SCI. 357 (2015).

14. *See* Krawiec, *supra* note 5.

ple), but this should be distinguished from the technocratic account. Indeed, it fits better as part of the strategic one sketched below.

A now classic, if cynical, explanation for expansive participatory procedures is based on the strategic considerations of the elected officials that create and delegate authority to administrative agencies. There is some tension between the strategic account and the technocratic one—in many circumstances the procedures put in place for strategic reasons will hamper effective and well-considered agency action—but they are not mutually exclusive.[15] Moreover, the procedures that allow for the most participation by the most people need not be the most efficient or lead to the most effective administration. To illustrate the tie between strategic considerations (which in this context are roughly equivalent to electoral considerations), let us consider two scenarios, one that will follow the ordinary course of politics in the United States and one that will capture the experience in the United Kingdom.

One way for the enacting coalition of legislators (including the executive in its legislative role, e.g., exercising its potential veto or proposal power) to go is to establish very thin, minimalist agency procedures. In that case agency rules would be (all else being equal) quick, easy, and inexpensive to implement, sidestepping problems like agency ossification. In this scenario, those constituencies who are displeased with the agency action can lobby the legislature to intervene. Agencies are, after all, empowered and structured by statute, they are merely exercising delegated authority that can typically be curtailed by legislative action. This makes reacting to the agency into a form of constituent service, which is thought to benefit the legislators.[16] The key thing to note here is that any public participation and democratic legitimacy is based entirely on the legislature. With its sparse, streamlined procedures the agency itself provides little in the way of a forum for democratic engagement. At best, on its own it can claim some attenuated democratic pedigree from the executive directing it and from the initial enacting coalition.[17] For direct public engagement, which is what Rose-Ackerman associates with democratic legitimacy, we would have to rely on the legislature in this scenario.

15. Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 213, 228 (1990).

16. I have some doubts about this last point. Almendares, *supra* note 3, at 245–51. But, it is a feature of the canonical account of the political motivation for extensive agency procedures. It seems like it would require some more elaboration for interest groups to be happy that the legislature is solving a problem that it basically created in the first place, but that is a discussion outside the scope of these comments.

17. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984); Almendares, *supra* note 3, at 279–86.

The first scenario captures the stylized facts of the UK political system and provides a solid, if incomplete, explanation behind the baseline of participatory procedures there. Thick, extensive participatory procedures become attractive, though, when the enacting coalition needs some way to entrench its policy decision and protect its constituents *without* direct legislative action. The participatory procedures become something of a substitute for the legislative constituent service in the previous scenario. The motivation for these procedures—despite their problems and inefficiencies—is that direct legislative action is extraordinarily difficult for Congress.[18] Part of this is an inevitable consequence of the separation of powers: the executive directs the agency[19] and will assuredly veto any attempt by the legislature to redirect the agency's policymaking. Relatedly, laws are just difficult to pass in the US; they must clear several procedural hurdles and require super-majoritarian support. Recognizing all this, the enacting coalition is not going to rely on future legislation to control agencies, and more to the point, the constituents demanding agency action will not, either. Participatory procedures are one answer. The legislature sets up these procedures so that the agency is then responsive to the public, creating a way for the public—or, more accurately, interest groups—to influence the agency without relying on the legislature. In effect, the enacting coalition is saying with these participatory procedures: "I can't protect you from this agency tomorrow, but here are some means by which you can protect yourself." The participatory procedures allow people to shape agency policymaking without the direct involvement of the legislature.

The difficulty in passing statutes reinforces this more complicated story in two ways. First, the very "stickiness" of laws makes this arrangement valuable: if any statute can be easily rewritten, then its value largely disappears. It is not worth working hard for something so fragile. Second, the participatory procedures help smooth over *intra*-branch disagreements.[20] For instance, reluctant senators who could filibuster legislation need to be persuaded that the agency will not threaten their constituents' interests. By enabling those constituents to protect themselves participatory procedures are one way to mollify skeptical lawmakers.

The structure of the UK legislature implies that by and large legislators can adopt the first strategy—a "wait by the phone" plan for agency procedures and control. For the reasons briefly described above, that strate-

18. *See, e.g.*, KEITH KREHBIEL, PIVOTAL POLITICS (1998).

19. At least in most cases, so-called "independent" agencies would be an exception.

20. Terry M. Moe, *The Politics of Structural Choice: Toward a Theory of Public Bureaucracy*, *in* ORGANIZATION THEORY 116, 125–27 (Oliver E. Williamson ed., 1995).

gy is not apt for Congress, explaining the difference, generally, in each country's approach to participatory procedures. This also explains why courts and the House of Lords are the sources of the impetus for the greater public participation that Rose-Ackerman identifies: ordinary lawmakers in the UK have little to gain from them. In demanding more participatory procedures, especially if the trend takes hold, the British courts are playing a role quite unlike those of federal courts in the US, which are tasked with maintaining the enacting coalition's procedural bargains.[21] The courts in the US help make them "sticky." The courts in the UK, on the other hand, seem more in the business of recasting the terms of the initial legislative bargain, though that may be a side-effect of their goals of involving the public to a greater degree.

II. OPEN QUESTIONS

The theoretical story based on legislative strategic interests helps explain the different baselines and approaches to administrative participatory procedures that the UK and the US have taken. It also helps account for the fact that Rose-Ackerman describes the courts and the House of Lords as leading the charge for more expansive and extensive participatory procedures, i.e., the call for more democracy with respect to agency action has been led by *undemocratic* entities. My remarks above show how if such a trend was to take hold in the UK we would expect it to have this quality, to come from just those quarters of the government because the democratic organs of British government have little reason to establish them. They serve little purpose for the legislature as the structural features that are so prominent in the US and make the participatory procedures so attractive to the federal government are absent. Moreover, these procedures—whatever their value and benefit—come with significant costs. They are inefficient in a basic sense, soliciting and evaluating potentially thousands of public comments takes substantial resources. And, if the goal of participatory procedures is something relatively democratic, that is, broad-based input by the population at large rather than comments from select interested parties (which would fit more with the technocratic account above), then we would need to account for those logistical challenges one way or another.[22] For rank and file members of Parliament, there is simply no corresponding benefit to counterbalance the attendant costs, especially if they are also

21. *E.g.*, Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984).

22. Citizen juries might be one potential option.

depriving themselves of the politically-valuable opportunity for performing constituent service by controlling the agency.

So, it makes sense, counterintuitively, that the impulse towards more democratic agency policymaking in the UK would come from sources other than the House of Commons. This should be phrased as a conditional, however: *if* the UK is going to change from its previous baseline (as Rose-Ackerman indicates that it might) and adopt broadly participatory procedures, *then* it is not surprising that the courts would lead the charge.[23] But, there still remains the open question, worth exploring in future works, as to why UK courts and the House of Lords would opt to go down this path. One possibility is that participatory procedures and the steps taken towards them enhance the influence that courts exert over agency action. In something like the modern notice and comment regime, the judiciary gains substantial control over agency policy, they are a form of gatekeeper determining whether an agency has adequately addressed the public comments.[24] The House of Lords could also be using participatory procedures as a means of flexing its usually vestigial authority.[25] These observations lead to some open questions to fully appreciate the relationship between agency procedures, democracy, and legitimacy.

A. Can self-serving procedures furnish democratic legitimacy?

A larger question is the normative implications of participatory procedures themselves. If the strategic account of agency procedures has any plausibility, how does that affect our normative assessment of those procedures? In other words, does it matter that the procedures that are furnishing agencies with democratic legitimacy are created for self-serving reasons, including and especially to empower interest groups? For my part, at least, this is not inherently problematic. It looks like another example of *Federalist #51*'s maxim that "ambition must be made to counteract ambition." Depending on the underlying motivations of UK courts and the House of Lords, which will determine what we can realistically expect regarding participatory procedures fostered by them, the UK has the opportunity to craft procedures far superior to those we have seen in the US. According to the theoretical account sketched in these comments, any legitimating effect of participatory procedures is something of a happy accident. The *purpose*

23. Aided especially by generous standing doctrines. *See* Rose-Ackerman, *supra* note 2, at 288–94.

24. Canonical examples include Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983), and Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

25. Rose-Ackerman, *supra* note 2, at 275–77.

of the procedures is not to promote a robust public policy debate or ensure that that agencies have firm democratic foundations for their actions. Instead, lawmakers seek to protect important stakeholders or bargain with each other in a form of procedural logroll. Participatory procedures that are purpose-built to enhance democratic engagement and legitimacy, on the other hand, have the potential to do a far better job than the notice and comment process familiar to administrative law scholars and practitioners in the United States.

B. Different sources of democratic legitimacy?

Considering the ideal participatory procedures leads to the next open question, which is whether there is anything wrong with the "wait by the phone" approach to agency policymaking. Is the standard baseline for the UK with little direct public input but the potential for vigorous legislative intervention somehow less democratically-legitimate than participatory procedures? In that kind of system all democratic legitimacy for agencies comes from the legislature, but lawmakers in the US and the UK are democratically-elected.[26] Do participatory procedures bring something distinct to the table that makes them worth the effort, or a distinct sort of democratic legitimacy that legislative oversight cannot provide? In a general sense, the answer may lie in the clarity of responsibility literature. When someone votes for a candidate that typically entails supporting them on a range of issues – taxes, foreign affairs, the environment, and so forth. So, voters might continue to support legislators despite them allowing agency actions the voters dislike; the policies of the specific agency may not be all that salient to the voters or other issues may take priority. That sort of democratic engagement associated with participatory procedures is much more focused, which could be a key virtue. All that being said, implementing participatory procedures in a country like the UK raises other, ancillary, and somewhat practical questions. Recall that one of the defining characteristics of the UK government was, in the stylized way it is considered here, that laws are (relatively) easy to enact. How would something like a notice and comment process flourish if the legislature can override its results with relative ease? In the US, the same difficulty in enacting legislation, especially legislation that would override actions sanctioned by the executive branch, makes it likely that the results of agency rulemaking procedures will stand.

26. I set aside for the moment various pathologies and defects in the electoral system like campaign financing. *See, e.g.*, Nicholas Almendares & Catherine Hafer, *Beyond* Citizens United, 84 FORDHAM L. REV. 2755 (2016).

C. Is Brexit sui generis?

The unique context of Brexit raises a series of related issues along these lines. Brexit presents a stark comparison between participatory procedures and some other form of democratic authorization. There was a referendum, so there was direct voter engagement on the issue. And, unlike electing candidates for office, the vote was only on a single, highly salient issue. The necessary question then becomes why that kind of authorization would be insufficient to confer democratic legitimacy, or whether there is more democratic legitimacy to be gained from participatory procedures. A likely answer is that there are myriad intertwined issues with Brexit that the electorate has not adequately engaged with, i.e., in this complex policy situation a single one issue vote might not be enough to confer democratic legitimacy. In such a case, the argument would go, democratic legitimacy needs something more; participatory procedures could be one solution, although so could, in theory, Parliamentary oversight.

At a more fundamental level, though, the foregoing discussion about political structure and participatory procedures was not only by necessity pitched at a high level of generality. It was also based on observations drawn from ordinary day-to-day politics. Brexit might just be different. The lawmaking procedures in the US make legislation far more cumbersome and costly. Yet, the fraught political situation of Brexit, which cuts across party lines and undermines the usually quite strong party discipline,[27] may have the same effect. So, participatory procedures needed to mollify skeptical legislators may take on new import on this particular issue. Moreover, the whole relationship between Brexit and electoral politics is unusual. I characterized the political relationship that gave rise to extensive participatory procedures as the enacting coalition saying: "I can't take care of you tomorrow, here are the tools you need to defend yourself." Brexit is distinguishable from ordinary legislation in two regards. First, it is unclear what would constituted the "tomorrow" for Brexit; it has more the character of a one-off event. Second, Brexit involves negotiations with the European Union; influence within Britain, the sort of thing that participatory procedures could provide, is only part of the equation. Therefore, Brexit involves not only a referendum, electoral politics, and agency policymaking, but complicates the relationship between all three. Understanding the place of democratic legitimacy and this exceptional set of policy decisions, and

27. *See, e.g.*, Stephen Castle, *Britain's May Avoids No-Confidence Vote as Conservative Rebellion Stumbles*, N.Y. TIMES, Nov. 20, 2018, at A4.

making the relevant normative judgments or recommendations, requires teasing out all of this and taking it into account.